

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 938 of 1991

to

FIRST APPEAL NO. 941 OF 1991

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT

and

MR.JUSTICE M.H.KADRI

1. Whether Reporters of Local Papers may be allowed
to see the judgements? Yes

2. To be referred to the Reporter or not? Yes @er
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3. Whether Their Lordships wish to see the fair copy
of the judgement? No

4. Whether this case involves a substantial question
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
No

5. Whether it is to be circulated to the Civil Judge?
No

STATE OF GUJARAT

Versus

PATEL & CO

Appearance:

Mr. S.A. Pandya, AGP, for the appellant in all the four appeals.

MR MG NAGARKAR for Respondent No. 1

CORAM : MR.JUSTICE J.N.BHATT and MR.JUSTICE M.H.KADRI
Date of decision: 17/03/97

ORAL COMMON ORDER (per: J.N. Bhatt, J.)

Whether an award of the arbitrator can be faulted on account of the fact that he has assessed his fees and remuneration in the calculation portion of the award in absence of any term in the arbitration clause of the tender agreement, and is it a misconduct warranting interference of the court, in exercise of its statutory powers under Section 33 of the Arbitration Act, 1940 (Act No.10 of 1940) {'Act' for short}, is the sole question which is raised in this group of four appeals for our consideration and adjudication.

The appellant in all the four appeals is State of Gujarat, which has challenged the judgment and order April 30, 1991, of the learned Civil Judge (S.D), Mirzapur, Ahmedabad (Rural), in Civil Misc. Applications Nos. 66 of 1989, 68 of 1990, 80 of 1990 and 81 of 1990. Since the common questions are involved between the common parties arising out of two common orders of the trial court, the entire batch of four appeals is being disposed of by this common judgment.

In fact, the sole contention raised on behalf of the appellant-State of Gujarat is that the award of the Arbitrator stands vitiated on the ground of misconduct. Question as he assessed his fees and remuneration as an arbitrator before taking the final decision, is raised for the first time before us. Admittedly, it was not raised before the trial court, and it is, therefore, "ipso facto" liable to be rejected on that count. Nothing is also shown as to why such a contention was not raised before the Civil Court. Though this ground is raised in Appeal, this court cannot entertain such a ground having been raised for the first time as the parameters of an appeal under Section 39 of the Act are very much circumscribed. Again, though an application for setting aside the award is permissible and maintainable under Section 30 of the Act before the competent civil court, such a contention is not raised

though objections were filed by the appellant-State on other counts. It may also be mentioned that even the Civil Court entertaining objections under Section 30 of the Act against the award or an application under Section 17 of the Act is not to act as an appellate court though the order passed by the civil court could be challenged by filing an appeal under Section 39 of the Act. Thus, the scope and ambit of an appeal under Section 39 of the Act is also very much circumscribed.

Section 39 in Chapter VI of the Act provides when an appeal shall lie from the orders passed under the Act. Section 39 reads as under:

39. Appealable orders.-(1) An appeal shall lie from the following orders passed under this Act (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order:

An order-

- (i) superseding an arbitration;
- (ii) on an award stated in the form of a special case;
- (iii) modifyng or correcting an award;
- (iv) filing or refusing to file an arbitration agreement;
- (v) staying or refusing to stay legal proceedings where there is an arbitration agreement;
- (vi) setting aside or refusing to set aside an award:

Provided that the provisions of this section shall not apply to any order passed by Small Cause Court.

(2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court."

It can very well be said from the aforesaid provision that, when an order of the court is in connection with the refusal to set aside an award, it is an appealable order under Section 39(1)(iv) of the Act. This batch of appeals is filed invoking the aid of the provisions of Section 39(1)(vi) of the Act contending that the Civil Court has wrongly refused to set aside the award of the Arbitrator in the aforesaid proceedings.

Section 30 of the Act provides the ground for setting aside an award of the Arbitrator.

"30. Grounds for setting aside award.- An award shall not be set aside except on one or more of the following grounds, namely:

- (a) that an arbitrator or umpire has misconducted himself or the proceedings;
- (b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under Sec.35;
- (c) that an award has been improperly procured or is otherwise invalid."

It is amply clear from the provision of Section 30(a) that an award of the arbitrator could be set aside by the civil court on satisfaction that the arbitrator has misconducted himself. The allegation, which is sought to be raised in this batch of appeals, is that the arbitrator has misconducted himself because of the fact that he has assessed and stated the quantum of fees and his remuneration in the award under challenge.

It may also be mentioned that Section 38 of the Act provides that in case of dispute or disagreement with regard to arbitrator's remuneration or costs, an application can be filed before the Civil Court for appropriate decision and direction. Section 38 reads as under:

"38. Disputes as to arbitrator's remuneration or costs.

(1) If in any case an arbitrator or umpire refused to deliver the award except on payment of the fees demanded by him, the Court may, on an application in this behalf, order that the arbitrator or umpire shall deliver the award to the applicant on payment into Court by the applicant of the fees demanded, and shall, after such inquiry, if any, as it thinks fit, further order that out of the money so paid into Court there shall be paid to the arbitrator or umpire by way of fees such sum as the Court may consider reasonable and that the balance of the money, if any, shall be refunded to the applicant.

(2) An application under sub-section (1) may be made by any party to the reference unless the

fees demanded have been fixed by written agreement between him and the arbitrator or umpire, and the arbitrator or umpire shall be entitled to appear and be heard on any such application.

(3) The Court may make such orders as it thinks fit respecting the costs of an arbitration where any question arises respecting such costs and the award contains no sufficient provision concerning them."

The sole contention raised before us in this group of appeals can be straightaway rejected on the ground that it was not raised before the civil court. No such contention was made in the objections against the award of the arbitrator. We, therefore, have no doubt that such a sole contention can be straightaway rejected on this ground itself.

However, since we were addressed on this question at a greater length, we have alternatively examined in this context even on facts. After having considered from the factual scenario emerging from the record, the sole contention is found to be without any justification. In our opinion, even on facts, such a contention is unreasonable and meritless in view of the following aspects:

- (i) The arbitrator had issued to both the sides several notices after filing claim petition for meeting of different dates;
- (ii) 16 dates were fixed by the arbitrator on various occasions right from the stage of filing of the claim statement till the date of the publication of the award.
- (iii) In view of the dispute between the parties, the respondents had invoked one of the clauses of the tender agreement pertaining to arbitration. As the appellant failed to appoint an arbitrator, the respondents, exercising rights under one of the clauses of the tender agreement, appointed one retired Chief Engineer, Shri M.H. Vakharia as sole arbitrator to resolve the dispute, which had arisen between the parties in connection with the tender agreement pertaining to the work contracts.
- (iv) The sole arbitrator issued notices on different occasions for different stages to both the parties

right from June 10, 1989 to May 15, 1990. The State of Gujarat, for the reasons not known to us, did not opt to contest and appear in the proceedings before the arbitrator. It is not in dispute that, though the State did not appear right from the inception even from the stage of filing of the claim statement till the last date of publication of award on May 10, 1990, there were as many as 12 meetings. Thus, the arbitrator had to convene different meetings commencing from the first meeting on August 16, 1989 to 12th meeting on April 13, 1990. Despite intimation of each and every meeting, the appellant-State of Gujarat decided not to appear in the arbitration proceedings. The first notice dated June 10, 1989 also did remain unresponded. A preliminary meeting was convened by the Arbitrator on June 20, 1989 before the meeting of August 16, 1989. The appellant had not even attended the preliminary meeting and, thereafter, also remained absent from attending all the 12 meetings.

(v) The arbitrator on completion of the proceedings in the last meeting, i.e 12th meeting on April 13, 1990, had written a letter dated April 26, 1990 to both the parties to deposit the amount of fees and costs of the arbitrator. There is no dispute about the fact that the arbitrator has assessed an amount of Rs.8,000/- by way of his fees and remuneration, which is also after the notice to both the parties and which is as per the Schedule of Fees. The appellant also did not respond to the said letter. Not only that, the arbitrator again sent a letter to the appellant-State on May 5, 1990 that the award shall be published by the arbitrator on May 15, 1990. There is also no dispute about the fact that the minutes of the hearings and proceedings had been sent to the appellant-State Government from time to time till the last hearing by registered post with acknowledgement due.

(vi) In so far as First Appeals No. 939 and 940 of 1991 are concerned, the Arbitrator awarded an amount of Rs.2,40,674/against the claim of Rs.5,80,294.00 made by the respondent-contractor. In so far as First Appeals Nos. 938 and 941 of 1991 are concerned, the Arbitrator passed an award for an amount of Rs.6,96,939.43 ps against the original claim of the respondent-contraactor of Rs.23,23,177.00.

(vii) The Arbitrator by invoking the provisions of Section 14 of the Act filed the award in the court. The respondent-contractor, invoking the provisions of Section 17, moved the court for judgment in terms of the award by filing Civil Misc. Applications Nos. 80 of 1990 and 81 of 1990 wherein the appellant-State of Gujarat filed statement of objections and raised the objections for setting aside the award of the arbitrator, without raising the ground which is raised in this group of appeals.

The grounds, which were agitated in the civil court, are not raised before us and the sole contention which is raised before us was not, admittedly, raised before the Civil Court. However, without entering into the technical aspects, we have examined the sole contention factually and legally and we have found that the sole contention raised before us in this batch of appeals is absolutely meritless on both the grounds factually and legally - requiring no interference in this batch of appeals exercising our powers under Section 39 of the Act. There is no dispute about the fact that the remedy available to the appellant-State of Gujarat under Section 38 of the Act is not availed of for the reasons not known to us. It may also be clearly mentioned that, after having considered the provisions of Sections 14 and 38 of the Act, it is very clear that the arbitrator could not be said to have misconducted himself simply because he had asked for his fees and remuneration or that he has assessed and determined the fees or remuneration in the award. From a combined reading of Sections 14, 30 and 38 of the Act, and the terms and conditions of the arbitration clauses incorporated in the tender agreement, it cannot be said that the arbitrator could be compelled to act without payment of fees. Receipt of fees in advance by the arbitrator does not amount to misconduct. No doubt, question would be different if the allegation is of excessiveness or unreasonableness in demanding the fees. So is not a question before us. As stated hereinabove, the arbitrator has assessed an amount of Rs.8,000/- by way of his fees and remuneration, which is after the notice to both the parties and which is as per the Schedule of Fees. Thus, in our opinion, there is no case of excessive or unreasonable demand and/or assessment of fees or remuneration by the arbitrator. In absence of such stipulation, each party is obliged to pay remuneration to the arbitrator and claim of such a

remuneration or accepting even such a remuneration by the arbitrator does not amount to a misconduct as contemplated under the provisions of Section 30 of the Act.

We may also point out that similar view is taken by the Division Bench of this Court in the case of the State of Gujarat & Another versus M/s. Vir Vijay Construction Company, reported in 1994(1) G.L.R. 119.

Therefore, in our opinion, the entire group of four appeals before us is liable to be dismissed being totally meritless and without any substance.

Accordingly, while affirming and confirming the impugned orders of the Civil Court, we, hereby, dismiss all the appeals. However, the parties are directed to bear their own costs. The interim order of injunction granted earlier during the pendency of the appeals shall, obviously, stand vacated.

(swamy)